No. 788.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

SAMUEL BROS. & COMPANY, (a corporation),
APPELLANT,
vs.
THE HOSTETTER COMPANY, (a corporation),
APPELLEE.

APPELLEE'S BRIEF.

E. EDGAR GALBRETH,
Solicitor and of Counsel for Appellee.

DEMOSS BOWERS, Law Printer, 175 N. Spring St., Los Angeles.

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In the "Statement of the Case," in Appellant's Brief, counsel for appellant falls into error in making the statement that "No attempt was made to prove any registered trade-mark," (bottom of page 2 of Brief), as Mr. R. S. Robb, the secretary and treasurer for many years of The Hostetter Company, testified that the

labels (A. & B.) had been registered and re-registered in the patent office as trade-marks, (Record, pages 70 and 79); also, in the further statement made that "The appellant denied the corporate existence of appellee, (Brief, p. 3), as appellant states in its answer (paragraph 1) that it "cannot admit or deny the allegations of said bill relative thereto contained in the first paragraph of said bill;" * * * also in stating therein (Brief page 8) that, "It is evident from the depositions themselves that the witnesses did not appear and give their testimony, and that the certificates of the notary public that the witnesses appeared before him is not true." There are changes and differences between the depositions both in words and punctuations; as an instance, in the depositions of R. S. Robb, on page 33, the following:

"Q. Are we to understand you that that right was exclusive?

"A. Namely, D. Herbert Hostetter," is entirely wanting in his subsequent deposition, given on page 68.

Also,

"Q. And he acquiesced in this conveyance?

"A. Yes, he was merely a nominal partner." (Bottom of page 77 and 51); and there are others.

Appellant intermingles with its "Statement of the Case," much that might be termed argument, if entitled to any designation, which appellee does not admit to be properly any part of the "Statement of the Case," or to be true in fact; such as that the

testimony of appellee's witnesses was more than met by the testimony of appellant's witnesses; or, that the distinguished Circuit Judge overlooked the testimony of defendant's witnesses (Brief p. 13); or, that appellee hired two spies (Brief p. 12); or, that appellant only disposed of seventy dollars worth of bitters a year (Brief p. 14); and such like arguments and conclusions of appellant's counsel in the "Statement of the Case."

APPELLEE'S POINTS AND AUTHORITIES.

I.

The omission of the answer herein to make a specific denial, as to appellee being duly incorporated, may be taken as tending to prove the allegations of the bill of complaint, relative to that matter; "Certainly any proof that establishes the fact should be sufficient."

Hanchett v. Blair, 100 Fed. Rep. 821;
Dutilh v. Coursault, 8 Fed. Cas. 4206;
Brown v. Pierce, 7 Wall. 205.

II.

Appellee has exclusive right to make Hostetter's Bitters and call them by that name. All of the cases cited by appellant to sustain a contrary doctrine, are either not applicable on account of difference of facts, or have been overruled; at least by implication.

III.

Appellee is not required to produce secret formula, but would be protected by injunction against being compelled to do so.

Champlin v. Stoddart, 30 Hun. 300-302;
Jarvis v. Peck, 10 Paige, 118;
2 Story's Eq. Jur., Sec. 952.

IV.

The Hostetter Stomach Bitters is not a quack medicine, nor beneath the dignity of any court to protect. For more than fifty years the preparation has been made and compounded by the members of the Hostetter family, in a uniform manner, and, as shown by the testimony of physicians of long experience and practice in their profession and thoroughly competent to give correct testimony relating thereto, did so testify, that said bitters had been frequently prescribed by them for the ailments mentioned in the label ("A."), with beneficial results; also, it is the testimony of others that they have received benefits from the use of the bitters. See testimony of

Dr. Louis C. D'Homergue, p. 492, et seq;
Dr. John F. Golding, p. 473 et seq;
Dr. Adolph Wieder, p. 498, et seq;
Dr. Gustave Pfingsten, p. 506, et seq;
Dr. Frederick E. Ruppel, p. 502, et seq;
Charles Schlich, p. 518;
William T. Fickett, p. 513;
Allan Russell, p. 524;
Augustus H. Marinus, p. 526;
Robert J. Reynolds, p. 514;
Major Richard P. Merle, p. 436;
James H. Lay, p. 512;
William J. Finn, p. 491.

Against the testimony of such persons having knowledge of what they testify to, appellant would

have this Court accept from persons testimony founded on acknowledged ignorance of the merits of the curative qualities of the bitters, giving no experience of results from the use of them, (except an overdose, or rather frequent doses at intervals of 15 minutes each); merely guess work.

Courts will not willingly allow the well and honestly earned valuable business and good will of a company like that of Hostetter's to be destroyed by infringement of their rights and unfair trade.

Collinsplatt et. al. vs. Finlayson et. al., 88 Fed. 693.

Hilson Co. vs. Foster, 80 Fed. Rep., 897,

Where the court, for Coxe J. says: "There should be no officious meddling by the court with the petty details of trade, but, on the other hand, its process should be promptly used to prevent an honest business from being destroyed or invaded by dishonest means."

V.

Appellee's bitters are not an alcoholic stimulant, nor contra-indicated in the diseases for which they are prescribed, nor are they a fraud on the public, but are a benefit.

Dr. Louis D'Homergue, a physician who has practiced medicine and surgery for many years, says that he has used Hostetter's Stomach Bitters as a general tonic with beneficial results, and, in proper doses—in such doses as, for instance, as are mentioned on label "A," for all the ailments mentioned on the said label,

it would be beneficial, (pp. 421), and, that a wine glass, contains 2 ozs. (not 4 ozs.), (pp. 422, 494).

Dr. Adolph Wieder, a physician of 12 years practice, in Brooklyn, N. Y., testified, that he had frequently prescribed Hostetter's Stomach Bitters with beneficial results, and that he had used it for himself and family with very beneficial results, and, that he had never heard any complaints of its being injurious or having bad effects, and, it could be prescribed with beneficial results in all the ailments set forth on the label. (pp. 424, 498, 499).

The decision in Celluloid Manufacturing Company v. Sellonite Manufacturing Company, 32 Fed. Rep., 94, it is stated that "It is the object of the law relating to trade-marks to prevent one man from unfairly stealing away another's business and good will. Fair competition in the business is legitimate and promotes the public good, but an unfair appropriation of another's business by using his name or trademark, or by imitation calculated to deceive the public, *or in any other way,* is justly punishable by damages and will be enjoined by a court of equity."

This idea seems to be followed further in the case of Enoch Morgan's Sons v. Wendover, 43 Fed. Rep., 420, wherein the court says: "The language 'unfair appropriation of another's business in any way' would include the substitution of 'Pride of the Kitchen' for 'Sapolio' (soap), when the latter was demanded. Anything done to induce the belief that the one article is in fact the other, is unfair, and, indeed, unlawful."

In Coates v. Holbrook, 2 Sand., Ch. R., 586, it is stated that "No person has the right to use the name of another."

The decisions so far as the *name* is concerned are so many that it would be useless to cite them. However, if the name Hostetter cannot be protected in this proceeding, then the good will of appellee's business is worthless, because its good will consists in the name under which the bitters are compounded and sold—the abbreviations thereof, as testified to by many witnesses, simply meaning the same thing.

In Gage-Downs vs. Fletcherbone, 83 Fed. Rep., 214, the court says: "The underlying principle in such cases is that a man cannot make use of a reputation which another manufacturer has acquired in a trade-mark or *name*, and by inducing the public to act upon a misapprehension as to the source of the origin, deprive the party of the good will and reputation which he has acquired and to which he is entitled."

In the opinion in Hostetter vs. Brueggerman et al., 46 Fed. Rep., 188, Judge Thayer says: "One counseling a fraud and furnishing the means of consummating the same is himself a wrongdoer, and as such is liable for the injury inflicted."

This decision is emphasized in Hostetter vs. Becker, 73 Fed. Rep., 297, and Hostetter vs. Somers, 84 Ibid, 333, the facts connected with the transactions being quite analogous to those in the case at bar. Hostetter's Bitters were sold and delivered in jugs

or demijohns, although not billed as Hostetter's Bitters, yet the suggestion was made that they should be sold at retail from the Hostetter bottles that had once been used to contain the genuine bitters—upon demand for Hostetter's Bitters; the defendants contributing the means for the perpetration of a fraud on the public by furnishing the empty bottles for the bulk bitters, sold on demand for Hostetter's Bitters. It will be observed that in the case at bar the appellant furnished the empty bottles, thus laying itself liable to a criminal prosecution under the laws of California. Penal Code, sec. 354.

For a definition of a *trade name,* counsel respectfully refers to the case of Fairbanks vs. Lockle, 102 Fed. Rep., 327, being a recent decision, where it is stated as follows: "That a trade name differs from a trade-mark, inasmuch as it appeals to the ear more than to the eye." So that, even although it is not claimed or pretended that the appellee's witnesses were deceived when they asked for Hostetter's Bitters and had the imitation delivered to them in bulk, yet may not others have been deceived by making like purchases on demand for Hostetter's Bitters, the name being so well known and so popular? Quite innocently might such retailer make such purchases and refill the bottles, under the impression that the appellee—the Hostetter Company—sold the bitters not only in bottles, but also in bulk, or by the barrel, as stated in the case of the South White Lead Com-

pany vs. Cary, 25 Fed. Rep., 125, wherein the court makes use of the following language: "The defendants sell their goods to retail dealers, and it may be that such dealers are not deceived, but they sell to customers who are or may be deceived, and the complainant is entitled to relief," etc.

In Avery vs. Meikle 81 Ky., 75, where appellants were successful plow makers, upon which they placed their trade-mark, and defendants made plows in imitation thereof, but did not imitate the *trade-mark*, still an injunction and other relief was allowed; appellees laid aside their own letters, trade-mark and numerals used to indicate the sign, &c., of this plow and sold cheaper than appellant. In the case at bar it will be noted that appellant does not pretend to use its *own name*or other indication of ownership, but prefers that of appellee.

Protection does not entirely depend upon an individual's invaded rights, but upon the broad principles of protecting the public from deceit.

Messete vs. Flannagan, 2 Abb., Pr. R. N. S., 459.

No person has the right to use the *name* of another. Coates vs. Holbrook, 2 Sand., Ch. R., 586.

"The courts will arrest at any course of the proceedings, although good faith is pleaded."

Coleman vs. Crump, 70 N. Y., 573.

If appellant is diverting appellee's trade by any practice designed to mislead its customers, whether these acts consist in simulating its labels, or *repre-*

senting in any way * * * its products as those of appellee's the latter is entitled to protection.

Anheuser-Busch Brewing Association vs. Piza, 24 F. R. 149.

The name of a firm is a very important part of the good-will of the business carried on by the firm. The question of a trade-mark is in fact the same question.

Churton vs. Douglas, 7 W. R., 365, (Eng.)

Chief Justice Fuller in Lawrence Manufacturing Co. vs. Manufacturing Co., 138 U. S., 537, said:

"Undoubtedly an *unfair and fraudulent* competition against the business of the plaintiff, conducted with the *intent* on the part of the defendant, to avail itself of the reputation of plaintiff, to palm off its goods as plaintiffs', would, in a case, constitute ground for relief."

And see Clark Thread Co. vs. Armitage, 67 F. R., 896.

Where the dominating character of a trade-mark *is a name by which the manufacturer's goods have become familiarly known to the public, another manufacturer has no right to designate his goods by that name, even though he accompanies it with a different device.*

It was decided in Curtiss vs. Bryan, 36 supra, 33, "that a mere false or exaggerated statement in a public advertisement will not deprive a complainant of protection in a court of equity, upon the ground

that the public is being deceived, or induce the imposition of a court of equity in its behalf.''

And the same rule applied in the case of Centaur Co. vs. Robinson, 91 Fed. Rep., 889, that is to say, that a false statement on a label did not deprive the complainant of relief, the label saying that the medicine sold consisted entirely of vegetable substances, and, upon analysis made and proved, it was shown that two mineral substances, to wit, bicarbonate of soda and rochelle salts, entered into the compound.

It is respectfully submitted that, in order to exclude the appellee herein from protection against the fraudulent acts of the appellant, it must be clearly shown that the appellee is guilty of fraudulent conduct toward the public; that it must be a fact known to the appellee as false, material to the public, and that the appellee has no reasonable ground to believe the statements made to be true, and no reasonable excuse for the statements. In this case the appellant seems to confine its proofs to these statements: That appellee's Stomach Bitters are an article intended to deceive the public; that the partaking of them is injurious to the public health; that their representations upon the labels, with advice or directions thereon given to persons suffering from numerous ailments, are false, and known by appellee to be false.

ARGUMENT.

That the appellee is the owner of the business, good will and property of its predecessor in interest relating to the business of compounding and selling of the medicinal preparation known as Hostetter's Stomach Bitters, was abundantly proven by the testimony of Mr. R. S. Robb, (pages 67 and 68,) and by "Complainant's Exhibit 'Assignment,' Introduced at Hearing." (Pages 543 to 546.)

Appellee corporation is composed of the sons and daughters of the predecessor in interest of the business (p. 67), and it has been decided in many cases that the appellee, The Hostetter Company, acquired from its ancessor, the original inventor and discoverer of the same, the formula under which it has been, for nearly a half century, in the manufacture of what is known as Hostetter's Stomach Bitters.

Hostetter Co. v. Wm. Schneider Wholesale Wine & Liquor Co., 107 Fed. Rep. 705;

Hostetter Co. v. Conron, 111 Fed, Rep. 737, and cases cited.

Hostetter et al. v. Adams, 10 Fed. Rep. 838.

The corporate existence of appellee was shown by the testimony of R. S. Robb (pages 76 and 78); also, by certified copy of "Charter" or Articles of Incorporation (pp. 547 to 552), and as such corporate existence was not specifically denied in the answer, any

evidence of the fact of the incorporation of appellee should be sufficient to establish that fact.

Hanchett v. Blair, 100 Fed. Rep. 817.

The depositions taken in Pittsburgh should not be suppressed. The taking of these depositions was neither unfair nor improper. It is true that by inadvertence the first depositions referred to appear to have been taken the 9th day of October, 1899, instead of October 13, 1899, as noticed, and it was not discovered until too late to prevent the same from being filed, but as soon as the mistake was discovered appellant's counsel was notified, in reasonable time, that other depositions of the witnesses would be taken in Pittsburgh, December 7, 1899. Every endeavor was made, facility provided and courtesy extended to counsel to have them present, on behalf of the appellant at the time and place of taking the depositions; and for a supposed accommodation to counsel, and that they might have further opportunity of being present the taking of the depositions was adjourned for eleven days, to-wit, until December 18, 1899.

The court will take judicial knowledge of the fact that the witnesses in Pittsburgh live at a greater distance from the place of trial than one hundred miles.

Mutual Ben. Life Ins. Co. v. Robinson, 58 Fed. Rep. 723.

The depositions under U. S. R. S. Sec. 863 may be taken before any notary public not being counsel

or attorney to either of the parties, nor interested in the event of the cause.

Reasonable notice must first be given in writing by the party or his attorney proposing to take such deposition, to the opposite party or his attorney of record, which notice shall state the name of the witness and the time and place of the taking of his deposition. Sec. 864 provides that every person so deposing shall be cautioned and sworn to testify the whole truth, all of which conditions were fulfilled, and the utmost good faith was observed toward the appellant in the matter of the taking of the depositions.

Also, see Equity Rule 68.

There is much evidence to support the charge of fraud and unfair dealing in the Bill of Complaint. The testimony of W. R. Morrison and J. W. McEvers, convincingly shows the following fact: That when they entered appellant's liquor store in San Francisco on March 30, 1899, they were met by Mr. Paul Samuel and after some conversation he was asked by Mr. Morrison if he had Hostetter's Bitters? He answered, "Yes," and being asked the price he replied "$8.50 per case." Thereupon Mr. McEvers said, "That is pretty high priced; there is not much in it to the retailer at $8.50 a case." Whereupon Mr. Samuel went into the office and shortly returned and said to Morrison and McEvers: "You fellows ought to buy Hostetter's Bitters in bulk; that is the cheapest way." Mr. McEvers asked him "if the bit-

ters in bulk were just the same as the other bitters." Samuel replied: "They are just the same, there is no difference in the bitters at all," and further said that he sold the bitters in bulk at $2.25 a gallon and that would make about eight bottles. He then *volunteered the statement* that he would tell them something, as they were new in the business, and that was that appellant would not handle Hostetter's Bitters if they could not get and sell them in bulk to their customers. Of course the Hostetter's Company *only sells* to importers, in bulk, for if they sold to all the small places they could not sell their case goods. (Pages, 109, 110, 181, 182.)

This elegant gentleman, "refined in manner and demeanor," generous and well educated (Appellant's Brief pp. 51, 1,) seeing before him two common men, and a doubtless good future trade from them, jumped at the chance to duly impress them with his ability to do business and give them the counsel and advice how they were to make the most out of the bulk bitters, by getting enough bitters for $2.25 to make nearly "eight bottles"—such as he furnished—empty Hostetter Bitters bottles, having thereon the two labels or trade-marks of appellee. Mr. Morrison then said he would take "a half gallon of Hostetter's Bitters" and Samuel directed an employee to fill up a half gallon of Hostetter's Bitters, which was done.

So, "choice of words, refined in manner and demeanor." And this gentleman as an instance of his generosity and business acumen, then further advised

the purchaser that he "*could get a bottle of Hostetter's Bitters, and then fill that up whenever it gets empty*," (page 180,) whereupon Mr. Morrison asked if he could get a Hostetter bottle at a drug store "handy," and this well informed salesman said to him, "you cannot get an empty Hostetter bottle at the drug store. *The junk shop is the place to get that*, (he was well posted) * * * but wait a moment," and then obtained and delivered to Morrison an empty Hostetter Bitters bottle, with the labels and trade-marks of appellee thereon; (pp. 112, 113, 180, 181).

Counsel asked Samuel—when a witness—this question, which was answered, (p. 233): "Q. 15. If these witnesses said that you told them to fill up the Hostetter's Bitters bottle with your H. Bitters and to palm them off on the public, is that true or false?"

"A. They don't tell the truth."

Now, whether that is ingenious or ingenuous, the question was not fairly stated, for the reason that neither Mr. Morrison nor Mr. McEvers, said that Mr. Samuel used the words "and palm them off on the public," nor was it necessary for him to say to fill the bottle with "H. Bitters," when the conversation, taken in connection with the circumstances of what was then, and just previously had, there occurred—the conversation about bulk bitters, the amount of bottles a gallon of bitters would fill, the

cheapness of the "nearly eight bottles" compared with $8.50 for twelve bottles of the case goods,— will leave no doubt in the mind of this honorable court, that the advice and intention of Samuel was that the empty bottles which he delivered to the purchasers should be filled up with the "H. Bitters and palmed off on the public."

On the second visit to appellant's place of business, on April 6, 1899, (pp. 126, 127, 191.) Mr. Morrison and Mr. McEvers were met by the same salesman, Mr. Samuel, who had waited on them on their previous visit, when Mr. Morrison said to him, "I want to get some more tokay wine, and $1.25 *worth* of Hostetter's Bitters, and a half gallon of sherry wine." Thereupon Mr. Samuel directed a man to "get the wines, and a half gallon of Hostetter's Bitters out of the barrel marked H. Bitters," and the order was soon filled and the demijohn containing the bitters was tagged, on one of appellant's regular printed tags or cards, which read: "Samuel Brothers & Company, wholesale wine and liquor dealers, 132-134 First Street, San Francisco. H. Bitters" (p. 128).

Mr. Morrison and Mr. McEvers are both plain but honest men, of veracity and good character, against neither of whom is there any reason shown why this honorable court should not believe they told the truth, the whole truth and nothing but the truth; every circumstance and the admitted or undisputed

conditions and environments of the transactions, sustain their testimony; the fact that they, on the same day on which conversations occurred, made notes and wrote reports of all such conversations, while the impressions were fresh, and especially as their attention was closely fixed upon and their memories charged with, what was said and done in their hearing and presence, so that they might be able the more accurately and minutely to detail the same in such reports, would far better fit them to more fully and truthfully state in their testimony just what was said and done at the times of their visits to appellant's place of business, than would be Mr. Samuel, who took no notes of what occurred, and who testified to matters which occurred more than a year afterwards, be he ever so much more polished in manners and generous in habits than they. They were in no wise spies, but were seeking to ascertain whether appellant was selling a stomach bitters as and for Hostetter's Bitters, which were in fact not Hostetter's Bitters, and the proper, and practically the only way to learn that fact was the course they pursued, viz., to inquire; and it was a matter of the utmost indifference to them whether appellant was so doing, for no possible contingency could arise, in either event, by which they would be profited, as they received the same pay for services rendered, in any event, (p. 213). There existed no incentive for them, or either of them to tell anything but the exact truth, and they did that in their testimony.

Appellant in his brief (pp. 27 to 34) has cited as authorities and quoted from persons who have, it may be presumed, enlightened the world upon the baleful effects of intemperance in the use, or abuse of alcohol. Should it not be sufficient answer for appellee to say that not even one of these distinguished (?) authors was produced as a witness; nor were any of their publications offered in evidence, or even referred to in the trial of the case. At what time or date the "New York Public Opinion," became authority to be cited in a court of Justice rests with appellant's counsel to give information; as to "Carpenter on Mesmerism and Hypnotism," appellee pleads ignorance and the work is not to be found in the law library. On page 32 of said brief, it is stated the "Hostetter formula is well known and is to be found in druggists' books." If such be the case why is appellant so exceedingly anxious that appellee should be compelled to divulge it. The proposition is ridiculous, upon its face.

In the case of Von Mum v. Frash, 56 Fed. Rep. at page 387, the court says: "It is further to be observed, that although in the case decided by the New York Court of Appeals, (Fisher v. Blank, 33 N. E. Rep. 1040) there was no testimony from witnesses that in the trade the defendant's manufacture had been taken for the other, the danger of such mistake was held sufficient to call for the interference of the Court. See also Braham vs. Beachim, 7 Ch. Div. 856. That case therefore overthrows

the objection taken here that there is no evidence of any instance where a person has been defrauded by the method adopted by the defendants in dressing up their manufacture. It is not likely that the knave who perpetrates the fraud upon the ultimate consumer will disclose himself to the complainants; and the ultimate consumer, if cognizant of the fraud practiced upon him, could not, unless by mere accident, be known to the defendants."

In the case of Hilson Co. v. Foster, 80 Fed. Rep. 896, the court says: "Money invested in advertising is as much a part of the business as if invested in buildings or machinery, and when the goods of a manufacturer have become popular, not only because of their intrinsic worth, but also by reason of the ingenious, attractive and persistent manner in which they have been advertised, the goodwill thus created is entitled to protection against unfair competition."

(U. S. C. C., N. Y. 1897.)

It was said by the Judge who delivered the opinion in the case of the Hostetter Company against the Wm. Schneider Wholesale Wine and Liquor Company, 107 Fed. Rep. 705:

"I think this case presents a clear case of unfair competition in trade and the doctrine rests squarely upon the proposition that men must be honest in their business transactions, and rely upon the merits of their own goods, and not to undertake to palm off inferior goods as and for goods of the genuine manufacturer, such as this case shows."

By what evidence does the appellant expect to be relieved or to succeed in ruining and destroying the business of the appellee? Evidently the testimony of Louis Falkenau should be excluded entirely, for the simple reason set forth in his answer to cross-question 48, p. 264, when asked what the liquid in the bottle claimed to be, by the defendants, a bottle of Hostetter's Bitters, he says: "The liquid that is now in this bottle, is alcohol, water, sugar and a number of other substances *which I have not been called upon to determine.*" It is most clearly in evidence that an extract of the character here in dispute, may contain many medicinal qualities, held in solution, which would constitute its real value; and this witness being produced as an analytical chemist to determine what they are, has not, according to his own admission, so determined—in fact, he denies being called upon to determine what they were. Then the answer to the next question is, that he was called upon to examine the material as to "alcohol (and a general idea as to the residue, not a full examination of the residue, only an idea of what it was that was in it.)" This, it must be admitted, was an unfair test of the contents of the bottle, whether it contained genuine Hostetter's Bitters or the bogus bitters made by one of the defendants. It being so vague and uncertain, appellee's counsel claim it should not be included in the consideration of this case; or, at any rate, it should not be considered as having any weight in determining whether or not

Hostetter's Stomach Bitters are what is claimed for them by appellee, namely, a medicinal preparation, and so far as this term is concerned, it may be noted that it is not shown that Hostetter's Bitters have ever been advertised, recommended or used for aught else than as a medicine, or what is termed a medicinal preparation. This gentleman, Falkenau, who claims to be a chemist, does not even know what constitutes a wine glass, as he says in answer to re-direct question No. 91: "I believe about two or three ounces; *I don't know.*"

Mr. Tompkins, who works for Curtis & Son as an analytical chemist, is the next expert witness who purchased from Mack & Co. a bottle of bitters. It seems that this sample of bitters was open to anybody about the establishment who wished to have access to it. He says (page 276): "The typewriter and two men connected with the wine-gauging department." That was after the analysis; before the analysis three members of the firm, including the witness, had access to it. This bottle was analyzed by the witness and Marvin Curtis, in conjunction, *yet Curtis is not produced as a witness*, nor Mack. It is marked exhibit No. 2, and when introduced and offered, Mr. Galbreth, for the appellee, asked for only a one-ounce vial of the contents of the bottles, which was refused. He then asked for a ½-oz. vial and this was refused also. This uncalled for action on the part of the appellant's counsel, should certainly cause the court to look upon the exhibit, and the claimed analysis of it,

with suspicion. This sample of bitters, so imperfectly identified as being of complainant's manufacture or compounding, is the substance from which Exhibit No. 3, claimed to be the analysis thereof, was taken. The witness says that Exhibit No. 3 is a correct analysis of the contents of Ex. No. 2, so far "as we are capable of analyzing it." Yet he does not even assume to testify to the ability of his colleague to make an analysis, or his qualification as an analytical chemist. The leading feature of this analysis or one of them, and one that seems to be dwelt upon by the defendant, is that it contained a baleful substance known as wormwood or absinthe. Since we have shown by Mr. Robb, who is conversant with the compounding of Hostetter's Bitters to a certain extent, that wormwood does not enter into such a compound at all, and by the testimony of the noted analytical chemist, Otto Wuth, that he found no wormwood at all, and from the fact that it is shown that Hostetter's Bitters have always been made or compounded in the same way, having the same ingredients, the conclusion must be and the only reasonable one is, that the defendant obtained some of the bogus bitters with which the market in San Francisco appears to be flooded, for the purpose of making this pretended analysis. Believing that wormwood or absinthe is a very injurious drug, causing all manner of trouble and all manner of derangements of the human system they lay great stress upon this point, that complainant's bitters containing wormwood are not entitled

to any protection in a court of equity. Then, the next point seems to be to make it appear to contain a much larger percentage of alcohol than it really does. This being such a simple test, it is another reason for believing that defendants have not analyzed Hostetter's Bitters at all; or, if they have, it was a sample that has been "doctored" and the percentage of alcohol increased by adding thereto more cologne spirits, a very simple and tempting process. Defendant's counsel fails to make this witness say that the analysis was made on a certain day, because he says he has forgotten (p. 52). Witness did not even prepare or make "Exhibit 3." He says (p. 50) that it was prepared by John Curtis & Son, not called to identify the paper or to corroborate the witness. He answers this question on page 33, "The next item, alcohol by volume, including volatile oil of wormwood 43.110 per cent., did you examine that yourself?" Answer. "I don't remember whether I made that particular part of it or not." Then follows and is spread upon the record a copy of this so-called analysis. The witness is asked this question (page 55) by defendant's counsel: "You brought the bottle here yourself, didn't you?" (Somewhat leading.) Answer. "Yes, sir; in person." Question. "Always was in your possession?" (Rather leading.) Answer. "Yes, sir, from the time it left the laboratory." Then, if we turn to this witnesses' testimony, we find on page

275-6 that this bottle was, he says, in the possession of the firm, and after the analysis it was accessible to anybody who could enter the laboratory; it was on the shelf and the janitor of the building had access to it, and anybody he would allow to come into the building; besides there was the typewriter and two men connected with the wine gauging department. This is only referred to to show the vague and uncertain manner in which the appellant seeks to bolster up its side of the case. The next resort is to Peart, a lawyer's clerk for Mr. Tilden, who brings with him one of the Hostetter almanacs, and it is offered in evidence. Mr. Galbreth's motion (276) to strike out all the evidence given by Mr. Tompkins on the ground of its incompetency, should prevail. Having produced this vague and imperfect analysis of bitters, obtained not from the laboratory of the complainant, nor from its agent, in San Francisco, but from some other person unknown to the complainant, who is not produced, the defendants make said analysis the foundation for hypothetical questions, and the physicians whose testimony hereinbefore has been referred to or examined thereon. Granting that they give as their *opinion* that the bitters compounded after a formula as shown by Exhibit No. 3, would, in their opinion, be injurious in many cases, or for argument's sake, we will say in all cases, still this is only a matter of *opinion* and it is not shown by any of the witnesses that any one has

been injured by partaking of this compound or one similar to it; nor is it shown by any one of their witnesses that the article so favorably known as Hostetter's Bitters, and so long a leading article in the drug trade in the United States and other countries, sold everywhere, has been injurious to even a single person who has taken them as *directed by the prescription* (or even otherwise), which is *plainly to be seen on the label upon every bottle.* They seem to take the position that because one of the substances contained in Hostetter's Bitters, to-wit: alcohol, which is the acknowledged menstrum for all substances of the sort and for the making of all tinctures, it might be in the crude state injurious, and that one of the doctors had heard of a case where alcohol was administered to a dog and the result was disastrous, in some way; still they seem to go no further, and defendant's witnesses, the professional gentlemen, reluctantly, perhaps, yet still do admit that alcohol is a medicine, that it reduces the temperature if administered frequently in fever. But then Hostetter's Bitters is a different substance, and the difference between alcohol and substances compounded by its use, is fully explained by Dr. Golding in his testimony, and must be apparent to every one. The intoxicating qualities of alcohol are overcome, if not wholly, at any rate partially, by the presence of other drugs. The great desire on the part of the defendants appears to be, as evidenced by their cross interrogatories, to get

the complainant to develop a trade secret. They have not applied to the court for an order to compel the complainant to make known this trade secret, and thus ruin their business by giving these people the secret formula for making the bitters, because, probably, they know that such order would not be granted.

The most injurious effect they are able to show that Hostetter's Stomach Bitters had produced, was by experimenting upon a member of the bar of San Francisco, who drank of the bitters so freely, and so frequently, without regard to the directions upon the label, that he was thrown into the arms of Morpheus, and given a headache, as he says. Further than that there was no complaint, and this seems to be the extent of the injurious effects of Hostetter's Bitters.

The appellants' Point No. 5 (p. 25) is manifestly absurd.

It was held in Tongen vs. Ward, 21 L. T. N. S., 480, that a defendant, under analagous statements of fact as in case at bar, was *bound to know* what *representations* his clerks made and was liable therefor. The facts in the Gorman case are not at all similar to those in this case. Who is Paul Samuel, (p. 231) appellant's star witness? And who Marks D. Levy? (223.)

Appellee is entitled to that protection which this court is able to give, and under the numerous decisions covering the field of "unfair competition in

trade," some of which decisions are above cited, we most respectfully submit that the appeal, should be dismissed and the decree of the Circuit Court affirmed.

E. EDGAR GALBRETH,
Solicitor and of Counsel for Appellee.